

commitment from TDS, and from TDS to La Star, are associated with Exhibit No. 5 to the Interim Operating Authority application). Again, the bank was available to lend money to TDS, not to La Star, and La Star was proposing to borrow money from TDS, not from the bank. The bank was relying on TDS, not La Star, for payment, and there is no reason why SJI should have been involved in negotiating the arrangements between TDS and TDS' bank. The *Initial Decision* does not suggest any reason **why** SJI should have been involved in the negotiations between TDS and TDS' bank. No reason is apparent, and neither the 1987 nor the 1988 arrangements between TDS and its banks have any bearing on control of La Star.

**d. Preparation of La Star Tax Returns Did Not Evidence Any Conscious Effort by USCC to Control La Star.**

According to the *Initial Decision*, the actions of USCC in relation to the La Star tax returns were evidence that USCC had *de facto* control over La Star. *Initial Decision*, ¶¶83 -88. However, Mr. Crenshaw testified that SJI assigned tax return preparation to USCC, at the initial 1987 meeting in Chicago. Tr. 1177. Tax return preparation was a clerical task; La Star had no income (Tr. 1130), and the returns were merely informational. Mr. Crenshaw testified that he viewed preparation of the tax forms in these circumstances as "grunt work," something that was beneath his position with SJI. Tr. 1184. USCC was asked to take care of it, and did so, along with the other "grunt work" it was asked to do. Mr. Crenshaw was sent copies of USCC's correspondence with the IRS. Tr. 1523. The

*Initial Decision* does not suggest any way in which USCC sought or gained any leverage over La Star, or affected La Star's conduct in any way, by dealing with this or other routine paperwork at SJI's request or at the request of La Star's attorney. Clearly, as a matter of law, SJI had the right to delegate such functions to USCC, and USCC had no reason to view this as in any way diminishing SJI's *de jure* and *de facto* control over La Star.

**e. USCC Never Exercised the Supermajority Provisions.**

According to the *Initial Decision*, USCC had negative control over the hiring and firing of the La Star General Manager and over litigation settlement decisions. *Initial Decision*, ¶219

In a February 16, 1988 Petition to Deny, NOCGSA had claimed that USCC had control over La Star by virtue of the supermajority provisions. USCC President H. Donald Nelson prepared an affidavit for association with La Star's opposition to the NOCGSA pleading, stating that although he had been advised by counsel that the supermajority provisions were legally unobjectionable, USCC had never exercised them. Mr. Nelson further stated:

If . . . the Commission considers any of the supermajority provisions of the Joint Venture Agreement to be contrary to its rules and policies, USCC, through its ownership of Star, which is the beneficiary of those provisions, would agree to delete them from the Joint Venture Agreement and would accept and obey an FCC order to that effect.

Affidavit of Mr. Nelson associated with La Star's March 2, 1988 Opposition. Mr. Brady also provided an affidavit agreeing, on behalf of SJI, to the elimination of the supermajority provisions in the same circumstances. Affidavit of Mr. Brady associated with La Star's March 2, 1988 Opposition.

Two years later, the Commission did express reservations about the supermajority provisions in the *Hearing Designation Order* (55 FR 23592, June 11, 1990) and USCC accepted the recommendation of La Star's counsel that certain of them be eliminated. USCC Exhibit No. 1, p. 17. These facts are not reflected in the *Initial Decision* or in the *Decision*.

**f. USCC Did Not Control La Star's Counsel.**

According to the *Initial Decision*,

"[T]here is no evidence in the record which even suggests that SJI was orchestrating and overseeing counsel's activities, or, for that matter, was even aware of the many activities engaged in by USCC and its employees on behalf of La Star. . . . [T]he evidence suggests that counsel was, throughout the relevant period, more the agent of the ineligible partner, than the agent of SJI. La Star might have a more stronger agency argument if it had chosen counsel used by SJI for other cellular matters." *Initial Decision*, ¶ 222

There is testimony by SJI principals that they told Mr. Belendiuk what to do; if credited, that testimony **establishes** that SJI was "orchestrating and overseeing counsel's activities." There is also testimony from Mr. Nelson that Mr. Belendiuk told him that SJI had asked him to get USCC to do those things he

asked USCC to do. Tr. 1379; Tr. 1380; Tr. 1385; Tr. 1454. Mr. Brady referred to Mr. Belendiuk as "my" attorney (Tr. 1053), and USCC had every reason to believe that Mr. Belendiuk was, in fact, representing the interests of La Star's majority owner, SJI.

Of primary importance **here** is the fact that, regardless of what SJI was doing or not doing, there is **no** evidence in the record that USCC was "orchestrating and overseeing" counsel's activities; there is ample evidence that USCC was not doing so and that it had no basis for any belief that it was doing so. Mr. Belendiuk had been La Star's attorney since long before USCC acquired its interests in Star, and USCC had never used him for any purpose. USCC paid Mr. Belendiuk's bills, as it was required to pay **all** expenses under the Joint Venture Agreement until it was amended in 1990; however, USCC never gave him any instructions, challenged his (or SJI) decisions after the fact (USCC Exhibit No.1, p. 14), or questioned his bills. Mr. Nelson testified that when Mr. Belendiuk asked him to have USCC do something for La Star, Mr. Belendiuk typically told him that he had previously cleared it with SJI. Tr. 1379; Tr. 1380; Tr. 1385; Tr. 1454. Mr. Brady also testified that he asked Mr. Belendiuk to make requests of USCC. Tr. 980.

**g. USCC Actions in Relation to La Star, Guided at Every Turn by La Star's Counsel, were Not the Sort Which are Indicative of an Intentional and Surreptitious Attempt to Control La Star.**

In summary, while the *Initial Decision* repeats with disquieting frequency the various routine, ministerial tasks that USCC personnel performed for La Star at the request of La Star's attorney, it cites **not even one thing** that USCC did affirmatively to wrest control away from SJI or even to challenge SJI's control of La Star. Nor does the *Initial Decision* mention even one policy decision that USCC made or attempted to make on La Star's behalf; there were none. USCC did nothing to cause SJI to play a lesser role in directing the affairs of La Star; nor did USCC do anything to make SJI **appear** to play a greater role than was the case, as one attempting to deceive the Commission as to the locus of control might do. It was not USCC's responsibility to make SJI exercise a greater degree of control than SJI desired, which would in any event have been tantamount to the assumption by USCC of a substantial amount of control over SJI and La Star. Nor was it USCC's responsibility, or desire, to suggest steps whereby a facade of control could be created so that SJI would appear to exercise more control over the affairs of La Star than it actually exercised.

As noted above, USCC had nothing to do with the initial organization of La Star in 1983, the drafting of the Joint Venture Agreement, or with the creation of any of the other circumstances under which SJI was found to have been passive from 1983 until August, 1987. USCC inherited the situation as it existed in August, 1987, without change. The Presiding Administrative Law Judge "found

that USCC took over the control of La Star formerly exercised by Maxcell." *Initial Decision*, ¶12. The *Initial Decision* contains no finding or conclusion that USCC did **anything** that it had not first been asked to do, generally by La Star's attorney, Mr. Belendiuk, or that it was not called upon to do under the pre-existing Joint Venture Agreement.

The Commission's *Decision* affirming the *Initial Decision* seems to say that the acts USCC performed for La Star might not have amounted to control if SJI had first convened a meeting of the La Star management committee and had formally delegated authority to USCC to perform them. See *Decision*, ¶30. The apparent basis for this is that with such a delegation, USCC would have been acting for SJI or La Star. In performing acts for La Star, however, USCC was not acting on its own behalf but was either fulfilling its obligations under the Joint Venture Agreement or doing what La Star's attorney told USCC that a representative of the SJI majority on the La Star management committee had requested.

Whatever impact SJI's failure to convene management committee meetings or to initiate formal resolutions might have on the wireline eligibility of La Star in the New Orleans MSA, those purported omissions were SJI's and not USCC's. Under the Joint Venture Agreement, USCC did not have any authority to call a meeting of the management committee. The Agreement provides,

Meetings of the Management Committee . . . may be called by the Chairman or by the Parties possessing a majority interest in the

Company on at least five (5) days' written notice to each member thereof, unless otherwise waived in writing. . . . The Chairman is responsible for calling meetings of the Management Committee at least once quarterly.

La Star Exhibit No. 12, Attachment B, pp 7 - 10. The omission of Mr. Brady, Chairman of the management committee, and of SJI, the majority partner, to convene meetings or prepare formal resolutions does not suggest that USCC acted improperly by doing as La Star's attorney requested after, as USCC reasonably believed, La Star's attorney had consulted with SJI, which had a fifty-one percent majority interest in La Star and a sixty percent majority of the management committee members.<sup>34</sup>

The Commission's *Decision* also suggests that La Star cannot successfully contend that control was reserved to SJI by virtue of the instructions given by SJI to La Star's attorney, Mr. Belendiuk, and then relayed by him to USCC and others

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<sup>34</sup> USCC does not understand why a formal meeting, or a formal resolution, of the management committee would have made any difference. SJI set the tone of informality, and USCC did not try to change that tone. Regardless of the level of formality adopted by SJI, USCC had every reason to believe that it was doing exactly what SJI wanted it to do, and no reason to believe otherwise. A formal meeting or resolution delegating authority to USCC would have been purely cosmetic, and would not have changed USCC's understanding of its role. USCC had no reason to believe that anyone would view it as having assumed control by performing the essentially ministerial acts it believed SJI wanted it to perform. USCC's understanding of the elements of control, as not embracing, *per se*, all day-do-day activities of an entity, was correct, see *e.g.*, *Storer Communications, Inc. v. FCC*, 763 F.2d 435 (D.C. Cir. 1985), holding that even the vesting of day-do-day management authority in corporate managers does not transfer "control" from a corporate board of directors to those managers.

because "SJI's connection with Belendiuk is tenuous." *Decision*, ¶132.<sup>35</sup> Regardless of whatever this may mean as to SJI's control over La Star, it means nothing as to USCC's control or lack of control. The record does not suggest that USCC's connection with Mr. Belendiuk was any **less** tenuous than SJI's; rather, "the record ties Mr. Belendiuk more closely to La Star's **original** minority partner [Maxcell] rather than to SJI." *Ibid.* (emphasis added).<sup>36</sup> The Commission's conclusion that Mr. Belendiuk was not acting on behalf of SJI also was not based on any finding that Mr. Belendiuk had any other ties with USCC. He had none. USCC Exhibit No. 1, pp. 14 - 15; La Star Exhibit No. 15, p. 2. The Commission's conclusion also was not based on a finding that Mr. Belendiuk was not vigorously representing the interests of La Star in the manner that he deemed proper, or that USCC had any reason to believe that Mr. Belendiuk was acting on USCC's behalf rather than on behalf of SJI or La Star. The Commission did not find that Mr. Belendiuk's claims to have authority from SJI were false, or that SJI was in any respect dissatisfied with his performance. Again, USCC's relationship with Mr.

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<sup>35</sup> The Commission also states, "La Star does not explain why USCC would be willing to forego its right to participate in management committee deliberations in this manner." FCC 92-243, ¶132. This ignores the fact that USCC **had** no authority to convene meetings of the management committee. It also ignores Mr. Nelson's testimony that La Star was of little importance to USCC and that, from USCC's perspective, no La Star matters of sufficient importance to warrant a meeting of the management committee had occurred since 1987. Tr. 1469.

<sup>36</sup> Indeed, Mr. Belendiuk's continued representation of La Star as counsel after USCC acquired Maxcell's interest supports the conclusion that Mr. Belendiuk was not USCC's lawyer.



Belendiuk was to do as he requested, presumably after he had conferred with SJI, and to pay his bills on behalf of Star, without questioning any of them.

In these circumstances, the record reveals that USCC did nothing whatever affirmatively to assert control over La Star, and that despite any apparent abdication of control by SJI, USCC did nothing to **assume** control. USCC merely paid expenses, on behalf of Star, as it was required to do under the Joint Venture Agreement, and acted in accordance with the requests it believed came from SJI, through Mr. Belendiuk.

Whatever else may be said of the Commission's determination that SJI was not in control of La Star, and that by doing what Star was required under the Joint Venture Agreement to do, and what USCC was asked by La Star counsel to do, USCC somehow filled the void left by SJI, that determination has no bearing on USCC's character qualifications in other cases. See *KQED, Inc.*, 3 FCC Rcd. 2821, 2827 (Rev. Bd. 1989), *aff'd* 6 FCC Rcd. 625 (1990); *Royce Int'l Broadcasting*, 66 RR 2d 1746 (Rev. Bd. 1989); *Valley Broadcasting Co.*, 66 RR 2d 200 (Rev. Bd. 1989). There is no finding or conclusion in *La Star*, nor is there any predicate in the record for such a finding or conclusion, that USCC intentionally usurped any element of control from SJI, or believed that it was doing so. At most, the *La Star* record shows that USCC participated in the affairs of an applicant in which it had a minority joint venture interest to the extent that it was obligated under its Joint Venture Agreement to do, or was requested by the

applicant directly or through its counsel to do. The predictive value for other proceedings of this conduct in *La Star* thus does not even rise to the level of *de minimis*.

**IV. If, Despite the Analysis Provided Here, the Commission is Not Satisfied of USCC's Good Faith and Other Qualifications on the Present Record, It Should Resolve Any Remaining Questions in the Context of the *La Star* Proceeding, and Withhold any Use of the *La Star* Record, Findings or Conclusions Elsewhere Until there is a Complete Record as to Those Matters.**

For the reasons set forth above, the record in *La Star* raises no questions of lack of candor, rule or policy violation, or of misconduct involving usurpation of control over anything. Yet by dismissing NOCGSA's contingent exceptions as moot, and leaving the questions which NOCGSA sought to raise dangling, the Commission has placed USCC in an exceedingly untenable position. The Commission delayed action on applications of USCC affiliates that were not cellular subsidiaries, and has put USCC to the necessity of fending off attacks by others in unrelated proceedings, which have thereby been substantially delayed. This unfairly leaves no effective way to seek redress save this Petition.

If, despite the analysis of the *La Star* record provided above, the Commission believes that additional evidence must be taken to resolve questions of fact left unanswered in *La Star* concerning the character of USCC, then the Commission should do whatever is necessary in the proceeding where those questions arose to obtain the evidence needed to answer them.

## CONCLUSION

The ambiguous language of Footnote 3 has led to numerous interpretations by parties with economic interests adverse to USCC. These unsupported interpretations have been articulated in numerous Commission and State court proceedings unrelated to the *La Star* proceeding. If given credence, these interpretations will have draconian consequences for USCC, far greater than the Commission could ever reasonably have intended one single ambiguous sentence in a footnote to have.

There are no questions concerning USCC's candor left over from the *La Star* proceeding to be resolved elsewhere. Nor does the *La Star* record contain any basis for an inference that USCC has a propensity to wrest control from majority partners. Footnote 3 has caused much delay in Commission action on USCC applications, contested and uncontested, routine and substantial. It has been harmful, serves no useful purpose, and should be deleted or otherwise nullified, without further delay.

Respectfully submitted,

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February 2, 1993

## APPENDIX I

Section	Description
Application	This February 29, 1988 "Application of La Star for Interim Operating Authority in the Northern Portion of the New Orleans MSA" consists of a nine page pleading signed only by La Star's attorney, Mr. Belendiuk. USCC had no involvement in its preparation.
FCC Form 401	The form 401 is certified and verified by Mr. John Brady, of SJI. Associated with it are the fifteen exhibits and Form 401 Schedules B identified below. USCC had no involvement in its preparation.
Exhibit 1	Disclosure of Real Parties in Interest. This exhibit describes La Star and provides information on SJI and TDS. Aside from the provision of information concerning the various TDS interests, USCC had no involvement in its preparation.
Exhibit 2	Wireline Qualifications. This exhibit describes SJI's wireline qualifications, from which La Star's are derived. USCC had no involvement in its preparation.
Exhibit 3	Cellular Geographic Service Area. This exhibit describes the proposed interim service area and certain engineering facts pertinent to it. USCC had no involvement in its preparation.
Exhibit 4	Environmental Processing. This exhibit describes certain of the environmental concerns raised by the application and explains how they are proposed to be resolved. USCC had no involvement in its preparation.
Exhibit 5	Cost estimates and financial qualifications. This exhibit includes proposed capital and operating costs for the interim system. While USCC personnel appear to have had some role in suggesting costs to Mr. Belendiuk, the record does not reveal whether those suggestions were adopted, in whole or in part. La Star was, however, free to accept, reject, or modify the USCC input and proceed as it pleased in proposing a budget to the Commission. The exhibit also includes a financial commitment from TDS, as well as material in support of that commitment.

Section	Description
Exhibit 6	Radio facilities within forty miles. This exhibit lists the pertinent SJI, Lafourche Telephone Co., and TDS facilities. Aside from the information on TDS facilities, USCC had no involvement in its preparation.
Exhibit 7	Public Interest Statement. This exhibit explains why grant of the La Star application would be in the public interest. USCC had no involvement in its preparation.
Exhibit 8	Service Proposal. This exhibit explains the nature of the local and roamer service La Star proposed to provide and how complaints will be resolved. USCC had no involvement in its preparation.
Exhibit 9	Engineering Methodology. This exhibit explains the basis for various of the engineering calculations set forth in Tables MOB-3 of the FCC Forms 401b. USCC had no involvement in its preparation.
Exhibit 10	Interconnection proposal. This exhibit explains how La Star proposes to interconnect with the public switched telephone network. USCC had no involvement in its preparation.
Exhibit 11	Control Point and System Alarms. This exhibit describes the locations of La Star's proposed control points, what equipment will be located there, and how the control points will function. USCC had no involvement in its preparation.
Exhibit 12	Design Concepts. This exhibit explains the proposed cellular configuration. USCC had no involvement in its preparation. La Star Exhibit No. 16; Tr. 1507; Tr. 1487; Tr. 1479.
Exhibit 13	Basis for Cell Splitting. This exhibit is based on demographic analysis of the service area and describes how system loading will affect future expansion. USCC had no involvement in its preparation.
Exhibit 14	Frequency Plan. This exhibit sets forth a proposed frequency plan for the interim operation and describes how there will be frequency coordination with nearby systems. USCC had no involvement in its preparation.

Section	Description
Exhibit 15	FAA notices. These notifications to the FAA of proposed tower construction were signed by Mr. Biby, La Star's engineering consultant. USCC had no involvement in its preparation.
Schedules B	These engineering materials were prepared by Mr. Biby. USCC had no involvement in its preparation.

## Certificate of Service

I, Jennifer C. Perry, a secretary in the law firm of Koteen & Naftalin, hereby certify that I have this date sent copies of the foregoing to the following by First Class United States Mail, postage prepaid:

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February 2, 1993